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NOTES.

CONFLICT OF LAWS—BY WHAT LAW IS THE LIABILITY OF AN INSURANCE COMPANY TO PAY, ON THE EXECUTION OF AN INSURED CRIMINAL, DETERMINED?—In a recent case the question arose as to the liability of an insurance company where the insured was put to death by legal execution for crime. The policy was executed at the company's office in Wisconsin. It provided that it should not take effect until the first premium should be paid. It was delivered to the insured, a resident of Virginia, in the latter state through the local agent of the company and there the first premium was paid. Death by legal execution was not excepted by the terms of the contract.

The representatives of the deceased argued that the contract should be governed by the law of Wisconsin where it was made, by which law such an exception would not be implied as in accord with the public policy of that state. But the court held that Virginia was the place where the contract was made; that the "proper law" was, therefore, the law of Virginia; and that the exception under that law must be read into the contract. In its opinion the court says:

"The obligation of a contract undoubtedly depends upon the law under which it is made."[1]

Now though it is obvious that the court did not here determine the validity of any part of the contract, still it was necessary to consider it as though containing a positive provision insuring death by legal execution and ascertain the proper law to govern its validity. In a state invalidating such a provision the exception would be implied in its absence, and in regarding the law of the place of making as the "proper law" the court followed the rule almost universally adopted in cases involving contracts of insurance.

The principles governing the choice of laws with respect to contracts are frequently stated by courts and text-writers in terms apparently inconsistent and conflicting. As to contracts in general it has been frequently stated that the validity and effect of a contract are governed by the law of the place where it is made.[2] Again, it has been stated in numberless cases that the validity interpretation and obligation of a contract is to be governed by the law of the place of performance if different from the place of making.[3] But, on examination, these cases do not appear to be in hopeless conflict. In the great majority of those cited in support of the first rule the question was as to the formal validity of the contract, *i. e.*, did the formulistic acts done constitute a contract? On the other hand, in cases regarding the place of performance as the "proper law," the questions raised include questions of breach and discharge, that is, performance in law. So it would seem that in many jurisdictions the rule laid down by Mr. Justice Hunt most exactly expresses the results obtained in the various decisions. The rule is that "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. * * *"[4]

In some jurisdictions, however, the courts determine what is the proper law by an examination of the intent of the parties. The rule is often stated that the parties are presumed to intend the law of the place of making, unless the contract is to be performed in a different place, when they are presumed to intend the law of that place. The doctrine was introduced into the English law by Lord Mansfield[5] from the civil law, where the idea prevails that a man

[1] Northwestern Mutual Life Ins. Co. v. McCae, 32 Sup. Ct. Rep. 220 (1912).

[2] Campbell v. Crampton, 2 Fed. 417 (1880); Roubicep v. Haddad, 67 N. J. L. 522 (1902); Hunt v. Jones, 12 R. I. 265 (1879); Carnegie v. Morrison, 2 Metc. 381 (1841).

[3] Pope v. Nickerson, 3 Story, 465 (1844); McDaniel v. Chicago & N. W. R. R. Co., 24 Iowa, 412 (1868); Dyke v. Erie R. R., 45 N. Y. 113 (1871); Waverly Nat. Bank v. Hall, 150 Pa. 466 (1892); Montana Coal Co. v. Co., 69 Ohio, 351 (1904); Springs v. Southbound R. R., 46 S. C. 104 (1896); Benners v. Clemens, 58 Pa. 24 (1868); Graham v. Bank, 84 N. Y. 393 (1881).

[4] Scudder v. Union Nat. Bank, 91 U. S. 406 (1875).

[5] Robinson v. Bland, 2 Burr. 1077 (1760).

may choose his law, is law in England today,[6] and has spread to America to considerable extent.[7] It is submitted, however, that the rule is not adopted in its entirety and that these American jurisdictions would still decide questions of formal validity by the law of the place of making regardless of the intention.[8] Under this rule the place of making and the place of performance of the contract are only evidence of the intention of the parties, and while the latter is sufficient alone to decide the question, its presumptive force may be rebutted by extraneous circumstances.

In dealing with contracts of insurance, however, most cases have determined the proper law regardless of the intention of the parties. In the light, then, of the rules laid down in Scudder v. Bank,[9] and which in substance are declared in many other cases, it would seem that too little attention has been paid to the claims of the laws of the place of performance as the governing law with respect to some of the matters arising out of insurance contracts. It is true the contract in that case was not an insurance contract, but it is not apparent why the rules laid down there are not applicable to insurance contracts. However, in cases where an insurance policy is issued in one state to become effective in another, it is held to be made in the latter and not subject to statutes of the home state in the matter of forfeiture or non-forfeiture for the non-payment of premiums.[10] It has been said that these cases only establish that where the contract is made outside of the state where the home office of the company is situated, the statutes of that state can have no extra-territorial effect;[11] but they have been cited, in cases where a local statute excluding the defense of suicide is in force in the jurisdictions where the contract was made, for the general prop-

[6] *In re* Missouri S. S. Co., 42 Ch. D. 321 (1889); Lloyd v. Guilbert L. R., 1 Q. B. 122 (1865); Chartered Bank of India v. Nav. Co., 9 Q. B. D. 118 (1882).

[7] Liverpool S. S. Co. v. Ins. Co., 129 U. S. 397 (1889); Coghlan v. R. R. Co., 142 U. S. 101 (1891); Hall v. Codell, 142 U. S. 116 (1891); Pritchard v. Norton, 106 U. S. 124 (1882); Bell v. Packard, 69 Me. 105 (1879); New England Mtge. Co. v. McLaughlin, 87 Ga. 1 (1891); Dickenson v. Edwards, 97 N. Y. 573 (1879); Thomton v. Dean, 19 S. C. 583 (1883); Grand v. Livingston, 38 N. Y. S. 490 (1896); Cattle Co. v. McNamara, 145 Fed. 17 (1906); Davis v. Aetna, 67 N. H. 218 (1892).

[8] Amer. Mtge. Co. v. Sewell, 92 Ala. 163 (1890).

[9] *Vide supra* (4).

[10] Mutual Life Ins. Co. of N. Y. v. Cohen, 179 U. S. 262 (1900); Equitable Life Ins. Co. v. Clemens, 140 U. S. 226 (1891); Griesemer v. Mut. Life Ins. Co., 10 Wash. 202 (1894); Fidelity Mut. Life Assn. v. Harris, 94 Tex. 25 (1900); Equitable Life v. Weinning, 58 Fed. 541 (1893); Antes v. State Ins. Co., 61 Neb. 55 (1900); Mutual Life Ins. Co. v. Hathaway, 106 Fed. 815 (1901); *contra:* on the ground that such a statute constitutes a limitation on the corporate power to contract applicable wherever the contract may be made or is by its terms performable; Fidelity Mut. Life Assn. v. McDaniel, 25 Ind. App. 608 (1900); Fidelity Mut. Life Assn. v. Ficklin, 74 Md. 172 (1891).

[11] Mutual Life Ins. Co. v. Hill, 193 U. S. 551 (1903).

osition that the "proper law" to determine the validity of stipulations in an insurance contract, is the law of the place where the contract was made.[12] These decisions have all turned on the point that the contract was consummated where the statute was in force, and that the law of the place of making was the "proper law" to apply. Mr. Minor gives as a reason for this, the fact that performance of such a contract, that is, the payment of money due thereon, "will never be illegal."[13] This explanation, however, does not seem sound. The conditions under which the money is to be paid determine the legality of the payment. The question is one having to do with performance of the contract and the very one arising in the principal case. Is there a promise on the part of the company to perform under the circumstances, or is an exception to its general promise to pay to be implied where the death is by legal execution in which case the company is discharged of all obligation and there is performance in law? It is submitted that under the rules as applied to contracts in general the question should be decided by the law of the place of performance. In the principal case the place of making and the place of performance being Virginia, the result would be the same under either law, but the language used is misleading.

Having decided the "proper law" to be the law of the place of making, the place of making under the facts was undoubtedly Virginia. Wherever there is an express stipulation in the contract that it shall not take effect until payment of the first premium and the premium does not accompany the application, but the company sends the policy to its own agent, who delivers the same to the insured upon receipt of the first premium, from the latter, the contract will be deemed to have been made in the state where the policy was so delivered and the premium paid.[14]

E. H. B., Jr.

CONTRACTS—PROCUREMENT OF BREACH.—The much mooted question of the actionability of a procurement of a breach of contract arose in an interesting way in a recent case in North Dakota.[1] The plaintiff had contracted with A to find purchasers for A's land at a commission per acre of land sold. He had also contracted with B to pay B for procuring such purchasers for him. He alleged that

[12] Knights Templar & Mutual Life Indemnity Co. v. Berry, 50 Fed. 511 (1892); affirming 46 Fed. 439 (1891); National Union v. Marlow, 74 Fed. 775 (1896).

[13] Minor; Conflict of Laws, Sec. 170, n. 1.

[14] Equitable Life Assur. Soc. v. Clemens (*vide supra*); Mutual Life Ins. Co. v. Cohen (*vide supra*); Mutual Life Ins. Co. v. Hill (*vide supra*); Mutual Ben. Life Ins. Co. v. Robinson, 19 U. S. App. 266 (1893); Milliard v. Brayton, 177 Mass. 533 (1900); Cravers v. N. Y. Life Ins. Co., 178 U. S. 389 (1899).

[1] Sleeper v. Baker, 134 N. W. Rep. 716 (N. D. 1911).